

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ADLEY EDGAR

Claimant

VS.

SUPERIOR INDUSTRIES INTERNATIONAL

Self-Insured Respondent

Docket No. 1,029,523

ORDER

Claimant requested review of the November 29, 2007 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on March 28, 2008.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy Unruh, of Pittsburg, Kansas, appeared for respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) denied claimant compensation for her back injury stating that "she did not provide a timely written claim for compensation."¹ He went on to conclude that claimant's low back injury was temporary in nature and that she was not entitled to any temporary or permanent benefits for that injury. The ALJ also denied the claimant compensation for her repetitive shoulder injury stating that the claimant "did not provide timely notice of the injury and did not provide a timely written claim for

¹ ALJ Award (Nov. 29, 2007) at 4.

compensation" and "failed to prove a right shoulder injury arising out of and in the course of employment".²

The claimant requests review of this Award alleging that she not only provided timely notice of her shoulder injury, but also a timely written claim for both her low back injury and the subsequent repetitive shoulder injury. She further argues that the "uncontroverted" medical testimony supports her claim for a 10 percent permanent partial impairment to the shoulder as well as a 5 percent permanent partial impairment to the low back as a result of those injuries.

Respondent argues that the ALJ should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

This claim stems from two separate alleged accidents, the first occurring on December 6, 2004, an accident which respondent concedes occurred. This first accident involved claimant's low back, hip and upper leg. The second accident, a series of accidents which is alleged to have occurred on July 5, 2005, involves claimant's right shoulder.

The issues to be decided in this appeal are whether claimant gave timely notice of the shoulder injury, whether it arose out of and in the course of her employment, and whether claimant provided timely written claim as it relates to both accidents. And if either or both accidents are found compensable, the Board must decide the nature and extent of claimant's permanent partial impairment.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days

² *Id.* at 5.

after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ concluded that claimant failed to give respondent timely notice of the second accident involving her right shoulder and the Board agrees with his analysis and conclusions. Claimant attributes her right shoulder complaints to the repetitive lifting she did after her December 6, 2004 accident. She further testified that she told "Eric" of the pain she felt while doing her work duties. However, respondent's representatives testified that there was no "Eric" who worked as a supervisor in the same areas where claimant was assigned. Those same representatives denied receiving any notice from claimant as to a shoulder injury. Claimant admits she never filled out any incident report relative to this shoulder injury. Based upon these facts, the Board has no difficulty affirming the ALJ's conclusion with respect to lack of timely notice as to the July 5, 2005 repetitive shoulder injury. Claimant did not give notice until she filed her written claim on June 14, 2006.

Although respondent conceded notice as to the low back injury occurring on December 6, 2004, respondent denied timely written claim, both as to that accident (involving the low back) and the subsequent series of accidents relative to claimant's shoulder. K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge.

Here, there is no dispute that claimant served respondent with a formal written claim for compensation with the Division on June 14, 2006 for both accidents. As noted by the ALJ, this is clearly beyond the 200 day limit for both dates of accidents. Thus, claimant must rely upon another document in order to satisfy this requirement.

The only other document which claimant has pointed to is an incident report which reflects the facts and circumstances surrounding the December 6, 2004 accident. This document obviously does not meet the statutory mandate for purposes of the July 5, 2005 accident as the incident report describes an accident whereby a forklift pinned claimant against a wall injuring her lower back, hip and thigh. There is no mention of her shoulder injury and claimant does not allege that the shoulder injury is the natural and probable result of her December 6, 2004 accident. Thus, for purposes of the July 5, 2005 accident,

claimant has failed to establish timely written claim. That portion of the ALJ's Award is affirmed.

As for the December 6th accident, the ALJ concluded that the incident report did not satisfy the statutory criteria. He concluded that the document -

...does not on its face say anything about the claimant requesting medical treatment or any other type of compensation. It merely describes the accident and the parts of the body injured. Considering that at the time the claimant completed this report she made no request for medical treatment, has made no request for medical treatment to date, and made no request for compensation of any type until a year-and-a-half after the accident tends to show that the claimant was not, by filling out the incident report, intending to ask the respondent to pay compensation.³

Claimant testified that by filling out this document, captioned "Employee Incident Investigation and Near Miss Report" she intended to ask for compensation in the form of medical treatment.⁴ She was referred to the safety officer, Tim Rakestraw, and he testified that he offered her medical treatment or the opportunity to perform light duty work for a week. According to Mr. Rakestraw, claimant elected to continue working, at light duty, and claimant was further told that if she had continued problems to seek out Mr. Rakestraw. Mr. Rakestraw testified that claimant never came to him and asked about further treatment for her back complaints. She returned to regular duty a week later and he had no further contact with her.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.⁵ The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.⁶ Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*⁷, the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in

³ *Id.* at 4.

⁴ R.H. Trans. at 15.

⁵ *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

⁶ *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

⁷ *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

The Board has considered the parties' arguments and concludes that this portion of the ALJ's Award should be reversed. The Board finds that the document which claimant completed satisfies the statutory criteria. The document sets forth the facts and circumstances surrounding the accident with the forklift. While it may not be captioned as a "claim", the document coupled with claimant's actions make it clear she intended on asserting a claim. Claimant went to see Mr. Rakestraw after her accident. He performed what he couches as an examination. The statute does not require any more from a claimant at that juncture. Thus, the ALJ's Award is reversed to reflect a timely claim for the December 6th accident.

Turning now to the nature and extent of claimant's impairment, the Board finds that the ALJ's conclusions are well supported by the facts and should be affirmed. The ALJ found that claimant sustained an injury on December 6, 2004, but that she failed to file a timely written claim as required by the Act. He went on to find that she sustained no permanency as a result of that accident. He based this decision upon the fact that she "soon returned to regular duties and that the injury required no medical treatment".⁸ Even Dr. Prostic, claimant's retained expert, acknowledged that she would qualify for a DRE Category I zero percent impairment as a result of her lack of objective injury. The ALJ's analysis on this issue is persuasive and is affirmed. Claimant's injuries following the forklift accident left her with no permanent impairment.

Similarly, the ALJ found no permanency as a result of the alleged shoulder injury reasoning that "the record showed that no such injury was ever mentioned to the employer and the claimant never sought any medical treatment for such an injury"⁹ Like the ALJ, the Board remains unpersuaded that claimant injured her shoulder arising out of and in the course of her employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 29, 2007, is reversed in part as to the issue of timely claim as to the December 6, 2004 accident and affirmed as to all other issues. Claimant is entitled to no award of compensation in this matter.

⁸ ALJ Award (Nov. 29, 2007) at 3.

⁹ *Id.*

IT IS SO ORDERED.

Dated this _____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy Unruh, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge